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IN THE

Supreme Court of the United States

October Term, 1957

Nos. 440 and 441

MORTON SOBELL,

Petitioner,

v.

UNITED STATES OF AMERICA.

REPLY TO GOVERNMENT'S OPPOSITION

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No. 440

1. At the core of both of our motions are newly presented allegations based upon recently obtained evidence that (a) the United States Government initiated, arranged and participated in the abduction of petitioner from Mexican territory; and that (b) the Government of Mexico neither deported nor expelled petitioner nor consented in any way to his seizure and removal. These allegations are no mere general charges but are based upon particularized factual claims (A. 16, 21-22, 25, 27, 28-29, 30, 36, 38; Exhs. 3, 4, 5, 7, 8, 9, 10, 11), which the Government has never denied.

2. Indeed, throughout these proceedings the Government has skillfully refrained from directly disputing or controverting these basic allegations. It has either ignored them, distorted them by equating them with altogether different contentions, or dealt with them indirectly so as to challenge their validity without seeming to do so. While such a response to our allegations is a neat solution to the problem of discrediting them without conceding the propriety of a hearing, its consequences are misleading and confusing. In its Opposition to both our petitions the Government has persisted in this tactic.

3. A prime example of the resort to this technique is the Government's argument (Opp. 19) that there was no perjury. But such a claim could only be made by ignoring the allegations in our Motion (A. 27-28) that the Chancellor of the Mexican Consulate at Laredo had specifically informed the witness Huggins that the Government of Mexico had not deported petitioner and that his abduction had taken place without the knowledge or approval of the Mexican Government. The Government does not mention this allegation—let alone deal with it in any way.

4. Equally strange is the Government's failure to respond to our contention (Pet. in No. 440, p. 29) that the prosecution knew that the entry on the manifest card was false and to our further contention (*Ibid.*, p. 30) that the Court of Appeals improperly denied our motion to amend the record to include an official statement by the Government of Mexico that petitioner's expulsion had never been ordered by the department officially charged with responsibility in this area.

5. It is now "entirely clear" to the Government and to the trial judge (Opp. 20) that the use of the terms "deportation" and "deported" merely denoted an involuntary return. But as we have shown (Pet. in No. 440, pp. 12, 32), the Court of Appeals which reviewed the conviction stated that evidence had been introduced "to show that Sobell had been legally deported".* It hardly matters whether the jury concluded that petitioner had been deported from Mexico pursuant to all the procedural requirements of Mexican domestic law or that he had been merely "expelled" by the Mexican authorities. The fact is that they were given the false impression that peti-

* This conclusion of the Court of Appeals which the Government's Opposition does not mention is presumably to be swept under the rug together with the allegations of the motions which are embarrassing to its case.

tioner was brought to trial as a result of the official efforts of the Mexican Government engaged in cooperation with the United States for the protection of hemispheric security. This impression was based upon evidence which the prosecution knew was false and it was massively prejudicial.

6. As the Court will readily recognize, the Government's contention (Opp. 11-13, 21) that the facts upon which the motion rests were known to the defense characteristically disregards the allegations of the motion to the contrary (A. 74). Indeed, these were the very facts which the prosecution suppressed.

No. 441

7. The Government's argument that petitioner previously litigated the claim made here that a violation of the Treaty of Extradition with the Government of Mexico deprived the trial court of jurisdiction to proceed against petitioner again falls back on a convenient disregard of our newly presented allegations with respect to the total absence of Mexican governmental action as well as the responsibility of United States agents for petitioner's abduction. How could the courts have "necessarily considered the question of jurisdiction over the subject matter" (Opp. 25) *sua sponte* when the Government, which alone had access to them, suppressed the facts which gave rise to the question? And the Government's additional argument of waiver likewise truncates our contentions to make them conform to its Procrustean bed of personal jurisdiction.

8. Having converted the issue into one of personal jurisdiction, the Government argues that in any event there was no basis for a claim of lack of personal jurisdiction because there was legitimate reconduction. Accord-

ing to the Government, "Mexico had the unquestioned right to reconduct petitioner from its territory with or without cause or procedural protection" (Opp. 27). But our allegations, which the Government does not dispute, show that the individuals responsible for the abduction were not acting in an official capacity, but purely as agents of the United States Government; and that far from exercising its "unquestioned right" to oust petitioner, the Mexican Government formally and officially disclaimed that it had ordered petitioner's expulsion. And, as we have shown, while the case was pending below a second disavowal of official action was offered in support of petitioner's contentions and improperly rejected by the Court of Appeals.*

9. The Government further contends (Opp. 28-29) that as a matter of international law an individual who is removed from a country in violation of an extradition treaty can never complain in a criminal trial of lack of jurisdiction over his person or of lack of national jurisdiction in the court. To this broadside contention the Government concedes that the situation presented by the *Rauscher* case is an exception. But if one sort of violation of an extradition treaty (a) deprives the courts of total jurisdiction and (b) gives the defendant in a criminal case the right to raise the question, obviously the instant violation of the extradition treaty must have precisely the same consequences. It would make an extradition treaty meaningless if a defendant in a criminal case extradited for the wrong crime is entitled to attack the jurisdiction of the court, but not where the extradition treaty is flagrantly violated by a resort to self-help.

Moreover, it is neither sound international law nor wise foreign relations to view the provisions of a treaty

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* These circumstances, of course, decisively distinguish the *Savarkar* case upon which the Government relies (Opp. 28).

of extradition as the raw material for international incidents or diplomatic protests. These provisions are an indefeasible part of the rights of every accused and are incorporated into local law. Writers on international law uniformly agree that the violation of a treaty of extradition produces effects not only upon the public relations of the interested nations but also upon any concrete actions which derive from such violations.*

10. To the unanswerable analysis of Mr. Justice Brandeis in the *Cook* case, the Government responds that it was a civil case and that it involved a foreign vessel and foreign nationals. But these distinctions play no part in the case and have no bearing at all upon the scope and applicability of an extradition treaty.

The Court must recognize that the Government has organized its contentions into a framework which confounds problems of personal jurisdiction and due process with problems of a wholly different order which are raised by the violation of a treaty. The "manner in which a criminal defendant is brought before the court" rubric simply cannot unify the issues in these two wholly dissimilar areas. This is not to say that there is no overlap in the sense that a court which is lacking in total jurisdiction also lacks jurisdiction over the person, but it is to insist that what is involved here is a treaty and not a domestic law or due process requirement. If, as we contend, the

* Garcia-Mora, *International Law and Asylum as a Human Right* (1956), p. 135; Lauterpacht, *Recognition in International Law* (1947), pp. 420, 425; Dickinson, *Jurisdiction Following Seizure or Arrest in Violation of International Law*, 27 Am. J. Int. L. 231, 244 (1933); Harvard Research in International Law, *Apprehension in Violation of International Law*, 29 Am. J. Int. L., Supplement, July, 1935; Carnegie Endowment for International Peace, *Resolutions of the Institute of International Law* (1916), "Resolutions of Oxford on Extradition," 1880, Article 26, p. 45, and amendment, 1894, p. 111.

treaty was in fact violated, the court which tried petitioner was as completely drained of jurisdiction as the court which tried *Cook* and *Rauscher*. And the Government's adulterous melange of cases and quotations drawn from other areas and unrelated fields cannot change this fact.

11. The important issues presented by this case with respect to the rights of a defendant who has been seized and tried in violation of a treaty are a product of the pervasive tension between the extralegal methods of counter-intelligence and the requirements of a treaty and of international law. They cannot be brushed aside by the truly amazing claim that no meaningful legal consequences are produced by such a violation. We earnestly submit that neither the Government nor the courts below have considered our motion based on a violation of the treaty of extradition in the light of appropriate legal standards.

Respectfully submitted,

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